

1 DIVISION OF LABOR STANDARDS ENFORCEMENT
2 Department of Industrial Relations
3 State of California
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8 Attorney for the Labor Commissioner

9
10 BEFORE THE LABOR COMMISSIONER
11
12 OF THE STATE OF CALIFORNIA
13

14 JEWEL KILCHER, professionally known)	Case No. TAC 02-99
15 as "JEWEL," an individual,)	
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15 as "JEWEL," an individual,)
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14 DETERMINATION OF)
15 CONTROVERSY)
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14 INGA VAINSHTEIN, an individual, and)
15 COLD WAR MANAGEMENT, a business)
16 entity of unknown origin,)
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14 Respondents.)
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18 INTRODUCTION

19 The above-captioned petition was filed on January 21,
20 1999 by JEWEL KILCHER, a.k.a. "JEWEL", (hereinafter Petitioner,
21 "KILCHER" or "JEWEL"), alleging that INGA VAINSHTEIN dba COLD WAR
22 MANAGEMENT, (hereinafter Respondent or "VAINSHTEIN"), acted as an
23 unlicensed talent agency in violation of §1700.5¹ of the California
24 Labor Code. Petitioner seeks a determination voiding *ab initio* the
25 management agreement entered into between the parties, and requests

26 ¹ All statutory citations will refer to the California Labor Code unless
27 otherwise specified.

1 disgorgement of \$1,843,450.00 in commissions paid to the respondent
2 throughout the length of the relationship.

3 Respondent filed her answer with this agency on February
4 18, 1999. A hearing was scheduled before the undersigned attorney,
5 specially designated by the Labor Commissioner to hear this matter.
6 The hearing commenced on January 8, 2001 through January 16, 2001,
7 in Los Angeles, California. Petitioner was represented by Patricia
8 L. Glaser and Larry S. Greenfield of Christensen, Miller, Fink,
9 Jacobs, Glaser, Weil & Shapiro, LLP; respondent appeared through
10 her attorneys David E. Koropp, Ray Perkins and Catherine A. Cook of
11 Winston & Strawn. Due consideration having been given to the
12 testimony, documentary evidence, arguments and briefs presented,
13 the Labor Commissioner adopts the following Determination of
14 Controversy.

15
16 FINDINGS OF FACT

17 1. In 1992, Jewel Kilcher moved to San Diego,
18 California to pursue her dream of becoming a professional
19 singer/songwriter. Soon thereafter, Kilcher and her mother, Nedra
20 Carroll, moved into Volkswagen vans to cut expenses and searched
21 San Diego coffee houses for an opportunity to perform. The
22 opportunity was realized in 1993 when Kilcher met Nancy Porter,
23 owner of an obscure coffee house named The Inner Change. The Inner
24 Change needed customers and Jewel needed exposure. The match was
25 perfect and soon Jewel developed a strong following of local fans
26 that loyally attended Kilcher's Thursday night regular engagement.

27 2. Kilcher and Porter agreed that when Jewel performed,

1 Porter would charge a three dollar per person entrance fee. Two
2 dollars went to Jewel, with one dollar and all of the coffee
3 receipts going to Porter. As Jewel's reputation as a talented
4 singer/songwriter spread, the record companies soon took notice.
5 At some point in mid 1993 record companies including, Virgin
6 Records, Sony and Atlantic attended her shows. After one
7 particular Thursday night performance in mid 1993, Kilcher was
8 approached by the respondent who attended the show accompanied by
9 Jenny Price of Atlantic Records. Vainshtein indicated she
10 currently managed a local San Diego band and expressed interest in
11 representing Jewel. Kilcher and Vainshtein entered into an oral
12 agreement for Vainshtein to manage Jewel's blossoming career.

13 3. At the hearing, Jewel alleged that Vainshtein
14 immediately took an active role in securing employment engagements
15 on her behalf. Kilcher testified that Vainshtein not only secured
16 several small "gigs" throughout California, but also created
17 several opportunities for Jewel to contribute songs to movie
18 soundtracks; secured deals for Jewel to record songs for CD
19 compilations and tribute albums; created and negotiated several
20 licensing letter agreements to have pre-recorded songs included on
21 those CD's and movies soundtracks; attempted to negotiate a
22 publishing agreement on Jewel's behalf; created opportunities for
23 Jewel to perform live at special engagements; and secured and
24 negotiated a photo shoot for Jewel. The allegations and
25 conflicting documentary evidence and testimony include the
26 following:
27

1 a. Vainshtein will take care of booking arrangements.

2 Immediately after representation commenced, Jewel
3 testified that Vainshtein told her that, "she [Vainshtein] would
4 take care of booking arrangements until Jewel is successful enough
5 to hire a booking agent." Other than Kilcher's testimony, the
6 petitioner did not offer other competent evidence to support that
7 testimony. The respondent steadfastly maintained the conversation
8 did not occur. As for most of the engagements in issue, it was the
9 word of Kilcher and her mother pitted against Vainshtein's. The
10 testimony of the parties was unavailing as to what actually
11 occurred.

12 Notably, Vainshtein was an experienced manager who
13 clearly knew she was precluded from booking shows without
14 possessing a talent agency license. This was demonstrated by the
15 management agreement which expressly provided that Vainshtein would
16 not procure, promise or attempt to procure employment or
17 engagements for Jewel.

18
19 b. Inner Change Café

20 Kilcher testified that Vainshtein was immediately pro-
21 active in booking her performances. Kilcher maintained that
22 Vainshtein approached Nancy Porter, owner of The Inner Change, to
23 discuss the new arrangements. Vainshtein told Porter that Porter
24 would have to deal with Vainshtein from now on and that \$3.00 per
25 person was not enough compensation for a talent like Jewel. Nancy
26 Porter supported Kilcher's testimony. Porter testified that when
27 Vainshtein made this request, she was offended by Vainshtein's

1 behavior and stated, "no, I book my own music.". Later that same
2 evening Vainshtein accused Porter of taking money from the door.
3 In retaliation, Porter asked Vainshtein to leave the Inner Change
4 and demanded that she never come back. The respondent attacked
5 Porter's testimony alleging bias. The respondent maintained that
6 Porter had maintained a friendship with the petitioner, her mother
7 and petitioner's counsel and that Porter had collectible
8 memorabilia from those early days that Atlantic Records or others
9 may be interested in purchasing. Notwithstanding respondent's
10 claim of bias, Ms. Porter's testimony was credible. And
11 irrespective of Vainshtein's understanding of relevant Talent
12 Agency Act prohibitions, the totality of the testimony established
13 that in 1993 Vainshtein unsuccessfully sought to secure increased
14 compensation for Jewel from Porter at The Inner Change.

15
16 c. Engagements between Mid 1993 through January 1995

17 Prior to Kilcher securing ICM as her licensed talent
18 agency, Kilcher performed countless engagements throughout Southern
19 California that she attributes to Vainshtein's efforts. These
20 venues located primarily in the San Diego area include, The Belly
21 Up Tavern; The Live Wire Bar; The Green Circle Bar; Sunfest; The
22 Wickiup Café; The Art House; The Edge; and an unidentified location
23 in Sacramento. Again, the parties testimony was in direct
24 contradiction on every allegation. Kilcher and Carroll argued it
25 was Vainshtein's connections in the San Diego area that lead to
26 these "gigs", while Vainshtein maintained it was Kilcher herself
27 who booked the shows.

1 The petitioner did not provide other witnesses in
2 addition to Kilcher and Carroll to support their claims, though it
3 was established that Kilcher's label, Atlantic Records wasn't
4 involved with these performances. The petitioner sought to prove
5 that Vainshtein booked these engagements because no one else could
6 have. The circumstantial evidence offered by the petitioner did
7 not rise to the level to support that finding. In fact, Kilcher's
8 own testimony was unavailing and her memory of those early
9 engagements was refreshed through an unauthenticated Internet cite
10 that purported to list all of Kilcher's early performances.
11

12 d. "Clueless"

13 In May of 1995 after Jewel had secured ICM as her
14 licensed talent agent, Jewel testified that Vainshtein secured and
15 negotiated the opportunity for Jewel to record "All by Myself" to
16 be included in the movie "Clueless". Vainshtein, unequivocally
17 denied the charge. The documents offered by the parties
18 established that the deal was negotiated and finalized by both
19 Steve Crawford of ICM and Jewel's transactional attorney, Eric
20 Greenspan. As demonstrated by credible documentary evidence, the
21 respondent was provided with the terms and agreement, but it was
22 not established that she negotiated or procured this engagement.
23

24 e. "Modern Rock Live"

25 Kilcher maintained the Vainshtein was responsible for her
26 participation on "Modern Rock Live". "Modern Rock Live" was a CD
27 compilation of live performances by various artists that would be

1 included with every purchase of a Sony Playstation. Sony requested
2 that Global Satellite Network (GSN) produce the CD and it was GSN
3 who sought to include Jewel's August 20, 1995, live recording of
4 "Race Car Driver" on the CD. It was established through
5 documentary evidence that as early as August 29, 1995, the
6 respondent was involved in discussions with The Global Satellite
7 Network long before either Atlantic or Greenspan entered the
8 picture. The documents indicated that Vainshtein had discussions
9 with GSN regarding material terms of the licensing agreement,
10 including compensation of twelve cents (.12) per unit for Jewel.

11 As with many of the projects that were completed
12 throughout the relationship, Jewel's transactional attorney Eric
13 Greenspan was brought in to finalize the legal terms of the deal.
14 There was evidence that Jewel's label, Atlantic was involved with
15 the licensing of "Race Car Driver", but there was no evidence that
16 Vainshtein or Greenspan's roles were conducted at the request of a
17 licensed talent agent².

18 The Respondent argued that if the Labor Commissioner
19 found involvement by Vainshtein with "Modern Rock Live", the
20 licensing of a previously recorded song for inclusion on a CD could
21 not implicate the Act because the licensing of a previously
22 recorded song does not require the petitioner to render any
23 services, and that constitutes "nothing more than the sale or
24 licensing of pre-existing intellectual property." As such, to
25

26 ² Labor Code §1700.44(d) states, "it is not unlawful for a person or
27 corporation which is not licensed pursuant to this chapter to act in conjunction
with and at the request of a licensed talent agency in the negotiation of an
employment contract."

1 include this type of transaction within the purview of the Talent
2 Agencies Act would effect a radical expansion of the Act."
3 Essentially, respondent argues that for implication of the Act, the
4 manager must "procure employment or an engagement" for an artist as
5 described in the definition of "talent agency" at Labor Code
6 1700.4(a). And the sale of a pre-recorded song is not an
7 engagement, nor does it involve employment.

8
9 f. "The Wizard of Oz"

10 During the holiday season of 1995, Kilcher offered her
11 talents to support the "Children's Defense Fund". Kilcher
12 performed as Dorothy in the live version of "The Wizard of Oz",
13 filmed in New York and later released on CD and Videotape. Nedra
14 Carroll testified that she saw Respondent negotiate the terms, but
15 this testimony was not buttressed by any documentary evidence nor
16 supported by other testimony. Alternatively, the negotiations
17 reflected in the correspondence establish Eric Greenspan's role in
18 the process. The testimony of the parties again were in stark
19 contradiction. Consequently, the petitioner did not sustain her
20 burden and it was not established that the respondent procured or
21 negotiated this charitable engagement.

22
23 g. "VH-1 Duets with Melissa Ethridge"

24 On September 20, 1995, the respondent received a letter
25 from MTV Networks enclosing an agreement for Jewel to perform a
26 duet with Melissa Ethridge. The document was then turned over to
27 Eric Greenspan to "look over". This document did not establish

1 Vainshtein's alleged procurement efforts. Conversely, this single
2 piece of evidence used by the petitioner to establish procurement
3 was refuted by the videotaped deposition of Linda Ferrando, Vice
4 President of Atlantic Records Video Promotion Department. Ferrando
5 indicated that her promotions department produced Jewel's itinerary
6 for this duet and testified that her primary responsibility was to
7 set-up concerts, interviews and performances for Jewel on
8 television. And though she did not have specific recollection of
9 setting up this event, she couldn't imagine any other possibility.
10 Based on the Atlantic Records representative's testimony and this
11 document, it is likely that Atlantic Records set up this engagement
12 which was finalized by Greenspan in his customary role.

13
14 h. Efforts to secure a music publishing deal with EMI
15 Music Publishing

16 There was a great deal of testimony aiming to establish
17 that Vainshtein discussed a possible music publishing agreement
18 with EMI Music Publishing employee, Carla Ondrasik. Ondrasik
19 testified that she desperately coveted Jewel as an EMI client and
20 was devastated when Kilcher signed with Warner/Chappell. It was
21 evident that Ondrasik did not have the authority to make this deal,
22 but she was close enough with those who were and Ondrasik relayed
23 her conversations with Vainshtein to those individuals. It was
24 also clear that Vainshtein engaged in conversations with Ondrasik
25 regarding a possible EMI publishing agreement. The extent of those
26 conversations were not clear, but Vainshtein was interested in what
27 Ondrasik had to say and Vainshtein was at minimum, testing the

1 proverbial waters by engaging in hypothetical discussions with an
2 EMI employee. Eric Greenspan, who was intrinsically involved with
3 Jewel's publishing contract, testified that Vainshtein engaged
4 regularly in conversations with the creative personnel of several
5 potential publishers and consequently, the totality of the evidence
6 demonstrated that the respondent was an active participant in
7 attempting to secure a publishing deal for Jewel, including the
8 discussions with EMI employee Ondrasik.

9 Again, the issue is whether the solicitation or
10 negotiation of a publishing agreement should be considered
11 "procuring employment or engagements for an artist", and thus
12 implicating the Act.

13
14 i. "Under the Water" for "The Craft"

15 In or around February of 1996, Jewel agreed to perform
16 the song "Under the Water" for the motion picture "The Craft".
17 This recording was produced by Respondent's friend Ralph Sall. The
18 petitioner and her mother, as well as Greenspan testified that this
19 opportunity came through the respondent. The documents disclosed
20 that as early as October 30, 1995, Jewel's talent agent, ICM was
21 aware of the opportunity and was initially involved in the original
22 negotiations, but these documents did not establish who initiated
23 contact with Sony Pictures regarding the recording and to what
24 extent ICM was involved.

25 On February 22, 1996, Jewel replaced ICM as her talent
26 agent with CAA. CAA representative Brian Loucks testified that CAA
27 had no involvement in the soundtrack. It was difficult to discern

1 what conversations Vainshtein had with respect to this engagement,
2 with either ICM, or Ralph Sall the producer. Again, it was
3 Greenspan who negotiated the terms of the deal, and Vainshtein was
4 not referenced in those documents. Conspicuously absent to testify
5 was Steve Crawford of ICM, the originator of the correspondence
6 reflecting this deal and Ralph Sall, the producer. As a result,
7 the circumstantial evidence, including Vainshtein's friendship with
8 producer Sall, was not enough to established that Vainshtein
9 created or attempted to procure this deal.

10
11 j. "I Shot Andy Warhol"

12 In March of 1996, correspondence between Eric Greenspan
13 and Philip Wild of Atlantic records ensued regarding Jewel's
14 participation to record the song "Sunshine Superman" for the movie
15 "I Shot Andy Warhol". Petitioner alleged that Respondent procured
16 this engagement through Vainshtein's friend, the director of the
17 movie. Absent was the testimony of this director, and again it was
18 Kilcher's word against her manager. The documents proved
19 unavailing and again without further evidence, Jewel could not
20 sustain her burden of proof for this engagement. Troubling was the
21 fact that Brian Loucks, Jewel's soundtrack agent for CAA testified
22 that CAA was not involved, thus implying Vainshtein's involvement.
23 To what extent remains a mystery and the proximity between this
24 engagement and Kilcher's replacement of ICM with CAA may explain
25 CAA's noninvolvement.

26 k. Concert to benefit the "Pedro Zamora Foundation"
27

1 In June of 1996 Brian Quintana, Producer and member of
2 the Board of Directors for the "Pedro Zamora Foundation", began his
3 quest to promote a concert in an effort to raise awareness of AIDS
4 to America's youth. After a series of letters to Kilcher's talent
5 agents that were forwarded to Jewel's mother and manager, Quintana
6 had a phone conversation with the respondent regarding Jewel's
7 possible participation. The contents of the conversation were not
8 established via testimony, but the subsequent correspondence proved
9 far more availing as to what actually occurred. After the
10 conversation with Vainshtein, Quintana began to advertise Jewel as
11 an artist scheduled to perform at the event. This advertising
12 campaign was conducted without Jewels approval, acceptance, or
13 knowledge. When Vainshtein realized Kilcher would not perform, she
14 unsuccessfully attempted to have Quintana retract the
15 advertisements. After several conversations with Quintana,
16 Vainshtein was unable to thwart Quintana's advertising efforts.
17 Vainshtein then contacted Eric Greenspan to handle the escalating
18 public relations problem of Jewel not performing at a well
19 publicized charitable event in which she was scheduled to perform.
20 In response to Greenspan's threatening letters, Quintana forwarded
21 to Greenspan a fax received by Quintana purportedly from
22 Vainshtein's employee, Lou Niles. The fax was consistent with
23 Vainshtein's business letterhead and stated the following:

24
25 Dear Brian,

26 Per your conversation the other day
27 with Inga. This is to confirm that
 Jewel will perform at the Oct. 5,
 1996 concert to benefit the Pedro

1 Zamora Foundation. She will already
2 be in town for an HBO taping on that
3 Sunday so she will not have to be
4 flown in.

5 Thank you for your
6 consideration. We look forward to
7 working with you.

8 Best,
9 Lou Niles/Inga Vainshtein

10 The respondent admitted to having conversations with
11 Quintana but denied accepting the offer for Jewel to perform.
12 Respondent's testimony was in direct contrast to that of Jewel's
13 mother who indicated that Vainshtein admitted after being
14 confronted by Carroll that she had indeed confirmed Jewel's
15 participation. Notwithstanding, respondent's attempts to impeach
16 Carroll through her deposition testimony, Carroll's account was
17 more credible than Vainshtein's.

18 Vainshtein testified that she was completely unaware that
19 her former employer Lou Niles had sent this acceptance via
20 facsimile to Quintana. A review of the correspondence that bounced
21 between Jewel's representatives and the Pedro Zamora Foundation
22 established that Quintana did not begin his advertisement campaign
23 without Vainshtein's confirmation. In a January 28, 1997 letter to
24 Greenspan, Quintana wrote, "We did not advertise or promote Jewel's
25 involvement until we had such confirmation from her management."
26 This position is both supported by Carroll's testimony and bellied
27 by the fact that Vainshtein conversed with Quintana prior to the
28 mysterious facsimile transmission.

29 Vainshtein did attempt to book Jewel for an event she
30 thought worthwhile, albeit without Kilcher's knowledge.

1 Vainshtein's account that she had no idea why this occurred is not
2 credible.

3
4 1. "Rolling Stone: Women in Rock"

5 In October of 1997, Rolling Stone magazine was
6 celebrating its 30th year by creating a 15 track CD, including songs
7 from contemporary female super artists. It was clear that Jewel's
8 label was involved in receiving the offer, but it was Vainshtein
9 who accepted the offer, transmitted via facsimile from Warner
10 Special Products. The correspondence leaves no doubt that
11 Vainshtein, along with Eric Greenspan agreed to the licensing of
12 "Who will Save Your Soul", to be included on the Rolling Stone CD
13 compilation. This evidence was buttressed by Vainshtein's self-
14 prepared computer generated notes which reflected she "approved the
15 use of [the] Jewel track". Clearly approving an agreement is
16 included in the definition of "procuring employment". Procurement
17 is not simply solicitation or negotiation. Again, the real issue
18 lies in whether the licencing of a pre-recorded song is an
19 "employment or an engagement" within the meaning of the Act?

20
21 m. Cartier Photo Shoot

22 In October of 1997 the Cartier Company sought to create
23 a photo book that would include Kilcher photographed with an animal
24 of her choice, with the proceeds going to a charitable cause. On
25 October 3, 1997, Vainshtein received a facsimile confirming
26 Kilcher's interest. The fax expressed Kilcher's desire to be
27 photographed with a cheetah or a horse. The fax denotes Vainshtein

1 was the first person to disclose the opportunity to Jewel. And on
2 October 21, 1997, it was Vainshtein who was first provided with the
3 draft agreement for Jewel's signature. It was not until one week
4 later that the draft agreement was forwarded by Cartier's
5 representatives to Eric Greenspan, again for Jewel's signature.

6 As was the case for every alleged procured engagement,
7 the testimony of Jewel and her mother agreed that Vainshtein
8 created the deal. Vainshtein disavowed all solicitation and
9 negotiation of the material terms. The conflicting testimony
10 placed greater importance on the documentary evidence. And it was
11 the aforementioned documents addressed to Vainshtein that did not
12 mention a talent agent, Nedra Carroll, Eric Greenspan or Atlantic
13 Records that prevails in this battle of conflicting evidence.

14
15 n. Y100 Compilation CD: "Who Will Save Your Soul (Live)"

16 Y100 radio station and Sonic Recording Studios
17 collaborated on a CD compilation that included Jewel's previously
18 recorded "Who Will Save Your Soul". Petitioner offered a letter
19 (pet. Ex. No. 11) from the radio station's program director
20 stating, "It's hard to describe how excited we were when you agreed
21 to let us put it on the CD." This letter speaks volumes. The
22 respondent argues the letter does not prove that Vainshtein
23 solicited or negotiated the terms for the licensing of this song
24 and should not be considered. We disagree. Procurement of
25 employment is not contingent upon solicitation and/or negotiation.
26 Acceptance of a negotiated instrument constitutes an important
27 element of procurement. And though solicitation and/or negotiation

1 was not established by a preponderance of the evidence, acceptance
2 of the deal was; and that acceptance satisfied the petitioner's
3 burden of proof. Moreover, a talent agent was not involved with
4 this deal.

5 Again the issue is whether negotiating with an entity
6 interested in procuring the license for a pre-recorded song to used
7 on a CD compilation constitutes "employment or engagements for an
8 artist."?

9 o. \$2,000.00 a month Stipend form Atlantic Records

10 The petitioner demonstrated that for one year in 1994
11 through 1995, Vainshtein accepted a \$2,000.00 a month "consulting
12 fees" stipend from Atlantic Records unbeknownst to Kilcher.
13 Petitioner argues the receiving of these monies constitutes a
14 breach of fiduciary duty owed to Kilcher and should be held in
15 constructive trust for Kilcher's benefit.

16 No evidence was brought demonstrating these payments,
17 totaling \$24,000, either altered Jewel's compensation or inhibited
18 or affected Vainshtein's performance toward Jewel. The Labor
19 Commissioner will not condone referral fees to talent agents from
20 production companies or clients that could lead to a breach of
21 fiduciary duty toward the artist, but no evidence was offered that
22 this "consulting fee" fell into this category.

23 4. There were several other alleged procurement
24 engagements plead by the petitioner, which do not require
25 discussion because the evidence did not establish Vainshtein's
26 procurement involvement other than the unavailing testimony of
27 Kilcher and Carroll.

1 5. Kilcher's testimony was credible, and her account
2 of the relationship was illustrated in her detailed memory of
3 Vainshtein's daily business practice, as described by the following
4 quote:

5
6 "She sent me, broken down, detailed
7 descriptions of the different things
8 she was working on during the day.
9 She would tell me which things she
10 was seeking out, if they were
11 soundtracks or personal appearances
12 or whatever they would be. She
13 would tell me about where the
14 negotiations were, how far along
they were and she would give me a
daily update up until something was
done or signed, as well as other
parts of her management job, which
would be clothing details, things
like that." Transcript pg. 126-127

15
16 6. On the one hand, this testimony reflects Jewel's
17 perception of Vainshtein's procurement, while on the other, the
18 testimony should not be overlooked as to the attention to detail
19 Vainshtein displayed with her client.

20 7. The petitioner did not establish that Vainshtein
21 engaged in egregious violations or engage in a pattern of reckless
22 behavior designed to evade the protective mechanisms of the Act.
23 As discussed in Buchwald v. Superior Court 254 Cal.App.2d 347, 356,
24 The contract was not a mere sham and pretext designed by the
25 respondent to misrepresent and conceal the true agreement of the
26 parties.

27 8. Conversely, the hearing established that Kilcher
benefitted from Vainshtein's involvement in her career. It was

1 Vainshtein who assisted Kilcher in securing Greenspan and it was
2 Vainshtein who brought Atlantic Records to Jewel's Inner Change
3 performance. Vainshtein proved to be a very capable representative
4 and Jewel's success is attributable in part to the hard working
5 efforts of Vainshtein. Vainshtein played a central role in Jewel's
6 career, and she made sound decisions with the projects she
7 recommended for Kilcher, guiding Kilcher's meteoric rise. But for
8 a few incidents, early in Kilcher's career in which Vainshtein
9 crossed the well established bright line precluding unlicensed
10 representatives from engaging in the procurement of employment, the
11 relationship proved a very successful one.

12 13 CONCLUSIONS OF LAW

14
15 1. The Labor Commissioner interprets the provisions of
16 this remedial statute broadly as intended by the legislature for
17 the protection of California artists. We also recognize the
18 legislature did not intend the Act to be used as a sword to
19 preclude representatives from their earned commissions. Also, we
20 appreciate the duty of this administrative proceeding, which is
21 designed not to focus on the Superior Court breach of contract
22 suit, but instead to focus on the alleged illegal activity of the
23 respondent. With those concepts in mind, the evidence was viewed
24 equitably, noting the tremendous financial loss potentially
25 suffered by the respondent for what we believe, not to be de
26 minimis illegal activity, but also not the type of illegal behavior
27 the legislature intended to correct and punish as reflected in
prior judicial decisions and legislative action. Notably, the

1 Labor Commissioner has consistently encountered more culpable
2 violations, whereby the petitioner has actually endured a loss as
3 a result of unlicensed activity. We realize a loss was not the
4 focus of petitioner's case, but close scrutiny of the evidence and
5 testimony of countless witnesses did not discern such a loss.

6 2. The issues to be determined are as follows:

7 a. Has the Respondent acted as an unlicensed talent
8 agency?

9 b. Does an attempt to secure a publishing and/or
10 licensing agreement through solicitation, actual negotiation,
11 and/or successful completion of that attempt, implicate the Talent
12 Agencies Act?

13 c. Can a transactional attorney shield a manager
14 from liability under Labor Code 1700.44(d)?

15
16 Has the Respondent acted as an unlicensed talent agency?

17
18 3. The primary issue is whether based on the evidence
19 presented at this hearing, did the respondent operate as a "talent
20 agency" within the meaning of Labor Code §1700.4(a). Labor Code
21 §1700.4(a) defines "talent agency" as:

22 "a person or corporation who engages
23 in the occupation of procuring,
24 offering, promising, or attempting
25 to procure employment or engagements
26 for an artist or artists."

27 4. Petitioner is an "artist" within the meaning of
Labor Code §1700.4(b). Moreover, Labor Code §1700.5 provides that

1 "no person shall engage in or carry on the occupation of a talent
2 agency without first procuring a license therefor from the Labor
3 Commissioner." It was stipulated that the respondent has never
4 held a talent agency license.

5 5. In Waisbren v. Peppercorn Production, Inc (1995) 41
6 Cal.App.4th 246, the court held that any single act of procuring
7 employment subjects the agent to the Talent Agencies Act's
8 licensing requirement, thereby upholding the Labor Commissioner's
9 long standing interpretation that a license is required for any
10 procurement activities, no matter how incidental such activities
11 are to the agent's business as a whole.

12 6. It was established that the respondent did procure
13 employment on several occasions, including: Vainshtein's attempt to
14 increase Kilcher's compensation with Nancy Porter at The Inner
15 Change Café; Vainshtein's attempt to accept Quintana's offer for
16 Jewel to perform at the "Pedro Zamora Foundation" concert for AIDS
17 awareness; Vainshtein's discussions and negotiations with the
18 representatives at Cartier for Jewel's participation in a photo
19 shoot; and Vainshtein's participation with "Modern Rock Live",
20 Rolling Stone's "Women in Rock", Y100's compilation using "Who Will
21 Save Your Soul" and Vainshtein's efforts to press Carla Ondrasik of
22 EMI for information on a publishing deal.

23 7. Applying Waisbren, it is clear respondent acted in
24 the capacity of a talent agency within the meaning of Labor Code
25 §1700.4(a). Vainshtein's efforts of combining her management
26 responsibilities with the above referenced procurement activities
27 was established on those occasions, and it is clear that the
respondent indeed procured employment without a license in

1 violation of Labor Code §1700.5.

2 8. Notably, the bulk of procurement activity fell
3 within the parameters of securing licensing and/or publishing
4 agreements which may not implicate the Act. The other areas of
5 procurement activity were directed toward charitable events, and
6 one occasion designed to obtain more than two dollars per person
7 (no commission for Vainshtein) at The Inner Change Café for
8 Kilcher.

9
10 Does an Attempt to Secure a Publishing and/or Licensing
11 Agreement Through Solicitation, Actual Negotiation, and/or
12 Successful Completion of that Attempt, Implicate the Talent
13 Agencies Act?

14 9. Considerable time was expended on the allegation
15 that Vainshtein's conversations with Carla Ondrasik created an
16 attempt by the respondent to secure Kilcher a publishing deal with
17 EMI Music Publishing. Labor Code §1700.4(a) defines "talent
18 agency" as, "a person or corporation who engages in the occupation
19 of procuring, offering, promising, or attempting to procure
20 employment or engagements for an artist or artists." The initial
21 question is whether the procuring, offering, promising or
22 attempting to procure a music publishing agreement constitutes
23 "employment or engagements for an artist"?

24 10. "Employment" is not defined under the Act. The
25 Supreme Court case of Malloy v. Board of Education 102 Cal.642
26 defined "employment" to mean, "Employment implies a contract on the
27 part of the employer to hire, and on the part of the employee to
perform services." Section 2(E) of Industrial Welfare Commission

1 (IWC) Order 12-2000, regulating the wages, hours and working
2 conditions in the motion picture industry defines "employ" as,
3 "means to engage, suffer, or permit to work." Black's Law
4 Dictionary (5th ed. 1979) defines "employment" as "[a]ct of
5 employing or state of being employed; that which engages or
6 occupies, that which consumes time or attention; also an
7 occupation, profession, trade, post or business". We are unable to
8 locate a definition of employment which does not require an act on
9 behalf of the employed.

10 11. A music publishing deal according to Eric
11 Greenspan,

12
13 "[is] one of the important income
14 sources in an artist's career.
15 Publishing in general, is -- or
16 publishing income is created anytime
17 a music composition ... is exploited
18 anywhere in the world. Exploited by
19 personal appearance, by public
20 performance on the radio, on
21 television, in the movie theater, on
22 a phonograph record, sheet music,
23 any of these various areas....In
24 North America, you can collect your
25 mechanicals directly ...from the
26 publisher...[Publishers] monitor the
27 record companies to make sure the
money is properly directed. They
file copyright notices. They
approve all licenses ... They
introduce artists to third party --
to other writers, and they look for
covers and means to exploit the
publisher's catalog to create other
sources of income."

12. This testimony is important, not because of what

1 it reveals about a music publishing deal, but for what it does not.
2 Essentially, according to Mr. Greenspan, a publishing deal is a
3 collection device for the artist, as the publisher is responsible
4 for the collection of royalties domestic and abroad. Mr. Greenspan
5 alluded that a music publishing deal contemplates future services
6 but was unable to explain in any meaningful way what those future
7 services are with respect to EMI's publishing agreement.

8 13. Clearly, "employment" or "engagement" requires a
9 duty of the employee to act. One cannot be an employee if there is
10 no affirmative to duty to render services. We are **not** concluding
11 that a music publishing agreement does not contemplate the
12 rendering of future services, we are stating that if a music
13 publishing agreement **does not** contemplate future services on behalf
14 of the artist, then consequently that agreement is not "employment"
15 within the meaning of 1700.4(a).

16 14. Here, there was no meaningful evidence that
17 suggests Vainshtein's discussions with Ondrasik contemplated an
18 agreement that included future services and we are therefore unable
19 to conclude that Vainshtein's conversations with Ondrasik were an
20 attempt to procure "employment or engagements for and artist"
21 within the meaning of the Act.

22 15. The same analysis applies for a person seeking to
23 license an artist's pre-recorded music, that does not contemplate
24 future services of the artist. A review of the licensing letter
25 agreements revealed no duty by Kilcher to render any future
26 services of any kind. Therefore, Vainshtein's negotiation and
27 acceptance for "Modern Rock Live", "Rolling Stone/Women in Rock",
and the Y100 CD compilations do not implicate the Talent Agencies

1 Act.

2 16. The Labor Commissioner does not want to encourage
3 activities that fall on the periphery of illegal conduct, so we
4 must be clear in stating that Vainshtein's activity toward these
5 compilations do not trigger the Act, because they do not logically
6 lead to any future services of the artist. If any agreement
7 procured by an unlicensed agent are reasonably calculated to lead
8 to a future performance, engagement or employment, then those
9 actions must be liberally construed to trigger the Act and suppress
10 the mischief at which it is directed. Buchwald, supra.

11
12 Can a Transactional Attorney Shield a Manager from
13 Liability under Labor Code 1700.44(d)?

14 17. It was the parties method of operation that Jewel's
15 transactional attorney, Eric Greenspan would enter negotiations for
16 various projects when an experienced attorney with Greenspan's
17 legal skills were required. Greenspan would be called to, *inter*
18 *alia*, review contracts offered by third parties to protect Jewel's
19 interest. This was demonstrated in Greenspan's refusal to allow
20 Cartier to use Jewel's likeness for any other purposes other than
21 the intended purpose of the animal photo shoot. He would also
22 handle all of the licensing agreements for a Jewel recording to be
23 used for another purpose. And he would be called to handle any
24 situation where possible litigation existed, i.e., "The Pedro
25 Zamora Foundation".

26 18. As a result of Greenspan's pervasive presence, the
27 question arose as to whether an attorney, not licensed as a talent
agent, might implicate the exemption found at Labor Code

1 §1700.44(d). Labor Code §1700.44(d) states, "it is not unlawful
2 for a person or corporation which is not licensed pursuant to this
3 chapter to act in conjunction with and at the request of a licensed
4 talent agency in the negotiation of an employment contract." If
5 the Labor Commissioner were to allow a California licensed attorney
6 to satisfy this exemption, it is possible that several of
7 Vainshtein's alleged procurement activities would be protected by
8 Greenspan's involvement. Notably, it was determined that Greenspan
9 did not solicit any of these engagements, nor request that
10 Vainshtein do so.

11 19. The express language of the exemption provides that
12 a "licensed talent agency" may invoke the exemption. An attorney
13 is not specified in 1700.44(d), or for that matter anywhere else
14 within the Act that could be construed to extend the exemption to
15 licensed California attorneys.

16 20. In construing a statute, court[s] must consider
17 consequences that might flow from particular construction and
18 should construe the statute so as to promote rather than defeat the
19 statute's purpose and policy. Escobedo v. Estate of Snider (1997)
20 60 Cal.Rptr.2d 722, 14 Cal.4th 1214, 930 P.2d 979. As discussed,
21 the purpose of the statute is to protect artists from unscrupulous
22 representatives. The Act provides a comprehensive licensing scheme
23 that allows the Labor Commissioner to regulate agent activity
24 through, *inter alia*, the approval of all contracts and commission
25 structures. Expanding the exemption to licensed attorneys invites
26 unregulated conduct that runs counter to the Act's remedial
27 purpose.

21. In addition, an exception contained in a statute to

1 the general rule laid down therein must be strictly construed.
2 Thorpe v. Long Beach Community College Dist. (App. 2 Dist. 2000) 99
3 Cal.Rptr.2d 897, 83 Cal.App.4th 655. Consequently, the Labor
4 Commissioner may not add words to a statute, particularly an
5 exception to the general rule, that would essentially change the
6 meaning of the statute. There may be considerable opposition that
7 could argue an attorney's license involves far greater protections
8 for an artist/client than a talent agency license. However, we
9 cannot rewrite the statute. That is for the legislature. To hold
10 otherwise would be counter to the remedial purpose of the Act and
11 provide unregulated managers the ability to avoid the Act's
12 liability through a means possibly not contemplated by the drafter.

13 22. The application of 1700.44(d) has historically been
14 construed very narrowly. All elements of the statute must be
15 independently met. The exemption is not satisfied when a licensed
16 talent agent appears to finalize a deal. The manager is only
17 relieved of liability when he/she "negotiates an employment
18 contract", not solicits one. And that negotiation must be **"at the
19 request of" and "in conjunction with"** a licensed talent agent.
20 Here, the burden of proof is on the respondent when invoking
21 1700.44(d). Even if Greenspan was a licensed talent agent, which
22 he is not, the areas where Greenspan's presence was felt, were not
23 done at his request.

24 23. Labor Code 1700.5 requires a talent agent to
25 procure a license from the Labor Commissioner. Since the clear
26 object of the Act is to prevent improper persons from becoming
27 [talent agents] and to regulate such activity for the protection of
the public, a contract between an unlicensed artists' manager and

1 an artist is void. Buchwald v. Superior Court, *supra*, 254
2 Cal.App.2d 347. Consequently, the management agreement between
3 Vainshtein and Kilcher is void *ab initio* and is unenforceable for
4 all purposes. Waisbren v. Peppercorn Inc., *supra*, 41 Cal.App. 4th
5 246; Buchwald v. Superior Court, *supra*, 254 Cal.App.2d 347. .

6 24. Labor Code §1700.23 provides that the Labor
7 Commissioner is vested with jurisdiction over "any controversy
8 between the artist and the talent agency relating to the terms of
9 the contract," and the Labor Commissioner's jurisdiction has been
10 held to include the resolution of contract claims brought by artist
11 or agents seeking damages for breach of a talent agency contract.
12 Garson v. Div. Of Labor Law Enforcement (1949) 33 Cal.2d 861,
13 Robinson v. Superior Court (1950) 35 Cal.2d 379.

14 25. Similarly, the Buchwald, court reasoned, The Act is
15 broad and comprehensive. The Labor Commissioner is empowered to
16 hear and determine disputes under it, including the validity of the
17 artists' manager-artist contract and the liability, if any, of the
18 parties thereunder. Buchwald, *supra*. at 357.

19 26. In Bank of America N.T.S.A. v. Fleming No. 1098 ASC
20 MP-432, the special hearing officer held that he has broad
21 discretion in fashioning a remedy that is appropriate under the
22 facts of the case. Consequently, the contract between the parties
23 is void *ab initio*, but in recognition of Vainshtein's minimal
24 illegal activity, the lack of mal intent, and the benefit conferred
25 upon Kilcher, it would be inequitable and a windfall for Kilcher
26 to require disgorgement.
27

1 ORDER

2 For the above-stated reasons, IT IS HEREBY ORDERED that
3 the 1994 contract between Petitioner, JEWEL KILCHER, a.k.a. "JEWEL"
4 and respondent INGA VAINSHTEIN, dba COLD WAR MANAGEMENT, is
5 unlawful and void *ab initio*. Respondent has no enforceable rights
6 under this contract.

7 Petitioner made a showing that the respondent collected
8 \$430,435.00 in commissions within the one-year statute of
9 limitations prescribed by Labor Code §1700.44(c). Notwithstanding
10 that showing, petitioner is not entitled to recoup those
11 commissions.


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18 Dated: 5/30/01



DAVID L. GURLEY
Attorney for the Labor Commissioner

19
20
21 ADOPTED AS THE DETERMINATION OF THE LABOR COMMISSIONER:
22

23
24 Dated: 5/30/01



THOMAS GROGAN
Deputy Chief

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Case No. TAC 2-99

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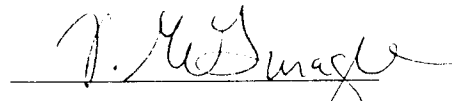
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4 I certify under penalty of perjury that the foregoing is true and correct.

5 Executed on May 30, 2001, at San Francisco, California.

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8 VICTORIA MCGUNAGLE